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August 26, 2016

Miranda Nichols (Miranda.nichols@state.mn.us)
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155

RE: Minnesota 2016 Draft Clean Water Act Section 303(d) Impaired Waters List

Dear Ms. Nichols,

The following comments on the Minnesota Pollution Control Agency (MPCA) 2016 Draft Impaired Waters Clean Water Act Section 303(d) List are submitted on behalf of WaterLegacy, a non-profit organization formed to protect Minnesota waters and the communities that rely on them.

First, WaterLegacy appreciates the listing of new draft impaired waters in the Lake Superior Basin that are impaired due to mercury in fish tissue and the water column. We've noted that the MPCA has identified the Partridge River from its headwaters to the St. Louis River as impaired for mercury in fish tissue and in the water column, and that three new segments of the St. Louis River (West Two River, East Two River, and Swan River) and three new segments of the Cloquet River are newly listed for mercury in the water column and/or mercury in fish tissue.

We believe that the MPCA's identification of these additional mercury-impaired waters highlights the need to prevent additional discharge of mercury and production and transport of methylmercury in the Lake Superior Basin. The listing of these additional mercury impairments underscores the need to control mercury releases, sulfate releases and hydrological changes to wetlands throughout the St. Louis River watershed in order to protect human health and wildlife and to prevent disproportionate adverse impacts on tribal and low income communities downstream that rely on fish for subsistence.

Although WaterLegacy was pleased to note that the target start year for Total Maximum Daily Load (TMDL) studies to evaluate and set load allocations to remedy these newly-listed mercury impairments is 2016, we were dismayed at the target completion year of 2029. Mercury is a bioaccumulative toxin that affects the developing brains of fetuses, infants and children; this 2029 target date is too remote to protect human health.

WaterLegacy has previously expressed our concern about the MPCA's disruption of the St. Louis River mercury TMDL process in 2013, which resulted in the loss of dedicated federal funding. We would request that a mercury TMDL study for all segments of the St. Louis River impaired due to mercury in fish and/or mercury in the water column be resumed immediately and that the target date for completion of this TMDL study and load allocation be advanced to 2019. We believe that Agency resources must be secured and prioritized to support this mercury TMDL and prevent continuing threats to human health in the St. Louis River watershed.

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In addition, despite MPCA commitments to the U.S. Environmental Protection Agency (EPA) and to persons submitting comments on Minnesota's Section 303(d) list since 2012, *the MPCA's 2016 Impaired Waters list fails to list even a single wild rice water impaired due to sulfate pollution exceeding Minnesota's existing water quality standards.*

WaterLegacy has commented on the failure of the MPCA to list wild rice impaired waters since 2012.¹ In response to many comments concerning the Agency's failure to list wild rice impaired waters in 2012, the Agency explained that listing wild rice waters had been a lower priority than listing Class 2 impairments, but that an assessment methodology would be developed for determining which waters had an ambient 10 mg/liter sulfate level, and which waters were "used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels" as provided in Minnesota Rules 7050.0224, Subpart 2.²

The MPCA explained that an assessment methodology was needed to identify wild rice sulfate impaired waters, and that this method would be developed for the 2014 Impaired Waters List:

Given these questions/information gaps, the MPCA was not in a position to assess sulfate impairment for the 2012 303(d) List. However, the MPCA is very much aware of the concern about sulfate and wild rice, and the MPCA plans to develop a wild rice sulfate standard assessment method to use in the development of the draft 2014 303(d) List.³

EPA's Decision Document approving Minnesota's 2012 Section 303(d) list documented MPCA's commitment to develop and apply an assessment approach for wild rice/sulfate impaired waters in 2014:

MPCA committed to the development of a wild rice/sulfate impaired waters assessment approach for the 2014 listing cycle within its response to public comments received for the 2012 303(d) list and in subsequent communications with EPA. MPCA also committed to utilizing this wild rice/sulfate impaired waters assessment approach to analyze and assess water quality data for potential impairment of the sulfate water quality standard for the 2014 listing cycle.⁴

In 2014, MPCA again failed to list any wild rice impaired waters, although the Agency had developed an assessment methodology and a preliminary list of priority wild rice/sulfate impaired waters in August 2013, as explained in WaterLegacy's February 10, 2014 comments on Minnesota's Draft 2014 Section 303(d) list. (Exhibit 3).

On April 25, 2014, the EPA deferred approval or disapproval of Minnesota's 2014 Section 303(d) list until an addendum listing wild rice/sulfate impaired waters had been supplied.⁵ To

¹ Exhibits 1 through 5 attached herein are WaterLegacy comments and follow-up letters pertaining to Minnesota's Section 303(d) lists of 2012 and 2014, which are dated February 20, 2012; March 3, 2013; February 10, 2014; April 25, 2014 and November 12, 2014.

² MPCA, *Responses to Draft 2012 303(d) List Comments*, Sept. 17, 2012, pp. 1-2, attached as Exhibit 6.

³ *Id.*, p. 1

⁴ EPA, Decision Document for Approval of Minnesota's 2012 Section 303(d) List, July 25, 2013, attached as Exhibit 7, p. 29.

⁵ EPA, Letter to MPCA regarding Minnesota Draft 2014 Section 303(d) List, Apr. 25, 2014, attached as Exhibit 8.

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date, more than two years later, the MPCA has supplied no addendum listing wild rice/sulfate impaired waters.

By November 18, 2014, when the MPCA responded to WaterLegacy's May and November requests for an update on the 2014 Section 303(d) process,⁶ the MPCA had shifted its position so that listing of wild rice/sulfate impaired waters would wait not just for an assessment methodology under the existing wild rice sulfate standard but for the Agency's determination of "what, if any, changes may be needed to the wild rice sulfate standard" after "the analysis of the standard is complete." At that time, the MPCA explained, the resulting methodology "will ultimately be used to determine whether *any* water used for the production of wild rice needs to be added to the draft 2014 Impaired Waters List."⁷

WaterLegacy's July 2, 2015 Petition to the EPA for Withdrawal of Minnesota NPDES Program Authority and our 445 pages of attached exhibits⁸ has underscored the undue influence of mining companies and their political supporters on preventing implementation of Minnesota's existing wild rice sulfate standard. In the fall of 2013, mining industry representatives requested the MPCA to delay listing of wild rice/sulfate impaired waters as "premature" due to ongoing research and potential rulemaking to change the existing 10 mg/L wild rice sulfate standard.⁹ MPCA had apparently accepted this position by November 18, 2014, when the Agency responded to WaterLegacy's request for an update on the 2014 Section 303(d) list.

In 2015, the Minnesota Legislature prohibited the MPCA from listing wild rice/sulfate impaired waters applying Minnesota's existing wild rice sulfate standard. Minnesota's "Wild Rice Water Quality Standards" 2015 Session Law states,

(2) the agency [MPCA] shall not list waters containing natural beds of wild rice as impaired for sulfate under section 303(d) of the federal Clean Water Act, United States Code, title 33, section 1313 until the rulemaking described in this paragraph [to amend Minnesota's existing wild rice sulfate standard] takes effect.¹⁰

The position proposed by the MPCA in November 2014 and imposed by the Minnesota Legislature in 2015 conflicts with the Clean Water Act, EPA's interpretation of its own federal regulations, and legal precedent. *See Thomas v. Jackson*, 581 F. 3d 658, 668-669 (8th Cir. 2009) ("[W]aiting for revisions to the standards would result in continued delays in producing any § 303(d) list. Concerns that a particular list will be based on imperfect, though approved, standards are mitigated by the periodic nature of the list.")

On the basis of the above analysis and the exhibits attached with our comments, WaterLegacy urges the MPCA to immediately resume the St. Louis River mercury TMDL and to revise the

⁶ See attached Exhibits 4 and 5.

⁷ MPCA Letter to WaterLegacy, Minnesota 2014 Impaired Waters List – Request for Update, Nov. 18, 2014, attached as Exhibit 10, emphasis added.

⁸ Petition for Withdrawal of Minnesota NPDES Program Authority and Exhibits are available at *NPDES Petition for Program Withdrawal in Minnesota*, <https://www.epa.gov/mn/npdes-petition-program-withdrawal-minnesota>. Selected exhibits pertinent to Section 303(d) listing are attached as Exhibit 9 to these comments.

⁹ Exhibits from WaterLegacy's Petition for Withdrawal of Minnesota NPDES Program Authority pertaining to the listing of wild rice/sulfate impaired waters are attached in Exhibit 9.

¹⁰ Laws of Minnesota 2015, 1st Spec. Sess. Chapter 4, Article 4, Section 136 (a)(2) included in Exhibit 9.

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target dates for completion of TDML studies in the Lake Superior Basin, beginning with a priority to complete a St. Louis River mercury TMDL by 2019.

We further request that the MPCA immediately list wild rice/sulfate impaired waters based on the existing wild rice sulfate standard in Minnesota Rules 7050.0224, Subpart 2 and existing monitoring of ambient sulfate rates and the presence of wild rice in priority locations. If the MPCA perceives that, under 2015 Minnesota Session Laws, the Agency is prohibited from listing wild rice/sulfate waters unless and until the existing sulfate water quality standard is amended, the MPCA should clearly state this conclusion as the reason for this deficiency in the Minnesota 2016 Section 303(d) Impaired Waters list.

Please feel free to contact me if you have any questions regarding WaterLegacy's comment or the attached materials.

Respectfully submitted,

A handwritten signature in black ink, reading "Paula Goodman Maccabee". The signature is fluid and cursive, with the first name "Paula" being the most prominent.

Paula Goodman Maccabee
Advocacy Director/Counsel for WaterLegacy

Exhibits Enclosed

cc: Tinka Hyde, EPA Region 5 Water Quality Division Director
Peter Swenson, EPA Region 5, Wetlands and Watersheds Branch Chief
Paul Proto, EPA Region 5, Watersheds Section
Barbara Wester, EPA Region 5, Regional Counsel